No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

LINDA K. BURNSIDES, suing on behalf of herself individually and on behalf of a class of similarly-situated persons, MARY M. SORG, suing on behalf of herself individually and on behalf of a class of similarly-situated persons AND GARY VYBORNY, suing on behalf of himself individually and on behalf of a class of similarly-situated persons,

Petitioners,

v.

MJ OPTICAL, INC., Nebraska Corporation; OPTICAL ILLUSION, INC., Nebraska Corporation; COMMERCIAL OPTICAL COMPANY, INC., Nebraska Corporation; OPTICAL SERVICES, INC., Nebraska Corporation; C.O.C., INC., Nebraska Corporation; OPTICAL SERVICES LIMITED PARTNERSHIP; and SHELDON I. RIPS, an Individual,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

On the same day that the sale of a business was consummated, the purchaser (MJ Optical) took actions which caused more than 100 of the seller's (Commercial Optical) employees to lose their jobs. The lower courts held that since the purchaser's actions took place on the day the sale was to be effective, that responsibility for notifying employees in advance of the plant closing under the Worker Adjustment and Retraining Notification Act ("WARN") never passed to the purchaser. The courts ignored the administrative regulations which clearly provide that such responsibility passes to the purchaser at the "time" of the sale. The question presented here is:

Should the purchaser of all or part of a business avoid liability for the failure to give notice because its actions occurred on the same day the sale was consummated even though the administrative regulations, which guarantee that someone is always responsible for giving notice, provide that the obligation to give notice passed to the purchaser at the effective time of the sale?

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PETITION FOR A WRIT OF CERTIORARI

Linda Burnsides, et al. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on November 10, 1997, in order to resolve the conflict between the language of the statute and the implementing administrative regulations and the important issue presented herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (App., Infra, 1a-10a) is reported at 128 F.3d 700. The court's opinion on the Petitioner's Petition for Rehearing was not reported but is contained herein (App., Infra, 11a-13a). The Decision of the District Court for the District of Nebraska was not reported but is contained herein (App., Infra, 14a-31a).

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit was entered on November 10, 1997. The court denied the Petition for Rehearing on December 8, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

29 U.S.C. § 2101(b) provides that:

> In the case of a sale of all or part of an employer's business, the seller shall be responsible for providing notice for any plant closing or mass layoff in accordance with Section 2102 of this title, up to and including the effective date of the sale. After the effective date of the sale of part or all of an employer's business, the purchaser shall be responsible for providing notice for any plant closing or mass layoff in accordance with Section 2102 of this title. Notwithstanding any other provision of this chapter, any person who is an employee of the seller (other than a part-time employee) as of the effective date of the sale shall be considered an employee of the purchaser immediately after the effective date of the sale.

STATEMENT OF THE CASE

This case involves the exceptionally important issue of the construction of the Worker Adjustment and Retraining Notification Act ("WARN" or "Act"), 29 U.S.C. § 2101 et seq., concerning the right of employees to receive sixty (60) days notice when their employment is terminated during a sale of all or part of a business in which they are employed.

1. The Transaction.

Commercial Optical, Inc. (hereinafter "Commercial Optical" or "seller") operated an optical laboratory business in Omaha, Nebraska. Commercial Optical and its affiliated companies, employed more than 100 full-time employees in May, 1993. Many of Commercial's employees were long time employees, some having been employed 30 or 40 years. Commercial's President, Director, and owner, Sheldon Rips (hereinafter "Rips"), contemplated a sale and/or merger of the Company whereby the Company's operations would continue. Rips entered into discussions with Michael Hagge (hereinafter "Hagge"), President of another Omaha, Nebraska optical business, MJ Optical (hereinafter "MJ Optical", "buyer" or "purchaser"), to sell MJ Optical the business.

On May 5, 1993, Commercial executed an Asset Purchase Agreement ("Agreement") with MJ Optical to sell it certain assets. The Agreement provided that the closing would occur on May 7, 1993 at 10:30 a.m. There was no closing since the documents were signed on May 5 and 6 and the consideration for the sale already exchanged. Commercial's employees were not informed about the closing of the facility and the loss of their jobs until approximately 2:30-3:30 p.m. on May 7, 1993, their last day of work. Neither Commercial's employees, the Mayor of Omaha nor the State of Nebraska Dislocated Worker Unit were ever provided with WARN notice from either Commercial or MJ Optical explaining why sixty (60) days notice could not have been given to the employees prior to the loss of their jobs.

2. Decision of the United States District Court for the District of Nebraska.

The class of Commercial employees brought suit under WARN against both Commercial and its affiliated companies as well as MJ Optical. After a trial, the District Court dismissed the WARN claim. The District Court's Findings of Fact and Conclusions of Law (App., Infra, 14a-31a) held that while WARN applied to the plant closing and termination of employees, neither the buyer or the seller were responsible for the failure to give notice to the workers.

3. Decision of the United States Circuit Court of Appeals for the Eighth Circuit.

The United States Court of Appeals for the Eighth Circuit affirmed in part, and reversed in part, the District Court's decision. The Eighth Circuit held that Commercial was liable for the failure to give notice and remanded the matter to the District Court for further proceedings.

The Eighth Circuit also held that MJ Optical was not liable for giving notice because the responsibility for giving notice remained with the seller (Commercial) "up to and including effective date (time) of the sale" under Section 2101(b).

4. Decision of the Eighth Circuit Court of Appeals on the Motion for Rehearing.

The Petitioners filed a Petition for Rehearing pointing out that the Eighth Circuit's interpretation of WARN

has created a period of time during which no one is responsible for giving notice, a result clearly contrary to the letter and spirit of the law. WARN provides that the obligation to provide notice of termination to the seller's employees passes to the buyer after the effective "date" of the sale. In order to avoid the hiatus, where neither party has responsibility to give notice "date" has been interpreted by the Secretary of Labor and Department of Labor to mean "time". 20 C.F.R. § 639.4(c). The panel denied the Petitioner's Petition for Rehearing (App., Infra, 11a-13a). Circuit Judge Donald Lay dissented, however, and stated that he would have granted the Petition for Rehearing and that the panel was erroneous in dismissing the Petitioner's claim against MJ Optical for the reason that it's Opinion created a period during which no one was responsible for giving notice.

REASONS FOR GRANTING THE PETITION

I. THE EIGHTH CIRCUIT'S OPINION IS CONTRARY TO THE ADMINISTRATIVE REGULATIONS IMPLEMENTING WARN.

A. The "Effective Date" Of The Sale Of Assets Was May 7, 1993.

The Asset Acquisition Agreement executed by the parties provided that the closing would be effective as of 10:30 a.m. on May 7, 1993. The principals had executed the closing documents prior to the afternoon of May 6, 1993. No actual transaction closing was held. Commercial Optical's lawyer had received the seller's check and fully executed closing documents by 8:30 a.m. on May 7, 1993,

thus completing the closing. No additional meetings were held to consummate the deal. MJ Optical began to remove the necessary equipment and assets from Commercial Optical's plant at approximately 4:00 p.m. on May 7, 1993. The facility was stripped of its equipment such that production of optical products at the plant could no longer be accomplished. Nevertheless, the appeals court held that Commercial Optical was still responsible for giving notice until 12:01 a.m., May 8, 1993, even though prior to this time, MJ Optical had, by its actions, caused the plant closing.

B. WARN's Regulations Provide That MJ Optical Should Have Been Liable For The Failure To Give Notice.

The WARN regulations create an absolute division of responsibility for giving notice between a buyer and a seller of a business. The seller is liable to give notice of covered actions which occur up to and including the date (time) of sale and the buyer is responsible thereafter. 20 C.F.R. § 693.3(c). At all times, one of the parties to the transaction is responsible for giving notice. The Act provides in 29 U.S.C. § 2101(b) that:

> "In the case of a sale of all or part of an employer's business, the seller shall be responsible for providing notice for any plant closing or mass layoff in accordance with Section 2102 of this title, up to and including the effective date of the sale. After the effective date of the sale of part or all of an employer's business, the purchaser shall be responsible for providing notice for any plant closing or mass layoff in

> accordance with Section 2102 of this title. Notwithstanding any other provision of this chapter, any person who is an employee of the seller (other than a part-time employee) as of the effective date of the sale shall be considered an employee of the purchaser immediately after the effective date of the sale."

WARN authorized the Secretary of Labor to promulgate regulations necessary to carry out its provisions. 29 U.S.C. § 2107(a). In this regard, the Secretary has provided as follows in 20 C.F.R. § 639.4(c):

> "In the case of the sale of part or all of a business, Section 2(b)(1) of WARN defines who the employer is. *The seller is responsible for providing notice of any plant closing or mass layoff which takes place up to and including the effective date (time) of the sale, and the buyer is responsible for providing notice of any plant closing or mass layoff that takes place thereafter.* Affected employees are always entitled to notice; at all times the employer is responsible for providing notice." (Emphasis supplied).

The regulations clearly indicate that if the plant closing occurs after the effective "time" of the sale, regardless of the effective "date," then the buyer (MJ Optical) is responsible for the notice to employees.

The Eighth Circuit expressly ignored the Department of Labor's regulations which state that as of the effective "time" of the sale, the seller's employees become the buyer's employees for purposes of WARN notice. In *Finkler v. Elsinore Shore Assoc.*, 725 F. Supp. 828, 831 (D. N.J. 1989), the court interpreted WARN by stating that "whoever is the employer at the time of the plant closing is

sponsible for notifying the employees sixty days in advance". *IATSE v. Metrocolor Laboratories*, ___ F.Supp. ___, 5 IER 929, 930 (C.D. CA 1990). *See also*: *International Alliance of Stage & Theatrical Employees v. Compact Video Services*, 50 F.3d 1464, 1468 (9th Cir.), *cert. denied*, ___U.S. ___, 116 S.Ct. 514 (1995) ("WARN's sales exception allocates notice responsibility to the party who actually makes the decision that creates an 'employment loss', but creates no other employment rights"). *See*: 20 C.F.R. § 639.6.

But both the trial and appeals courts held that MJ Optical was not be liable for giving the notice because liability does not pass to the seller until *after* the effective date of the acquisition (May 8, 1993). The Department of Labor has, however, already considered this reasoning and held it contrary to the statutory intent. Thus, in the Department's Final Interpretative Rule and Supplementary Information on Implementing the Worker Adjustment and Retraining Notification Act, 54 FR 16062, the Department of Labor stated:

> There were a wide variety of comments on this provision. One commentator suggested that the regulations make it clear that if the employees of a business that has been sold are not rehired by the buyer, the responsibility for giving notice is on the seller. *The Department believes that such an allocation of responsibility is precisely contrary to the statutory language and intent. If a plant closing occurred as a result of the buyer's decision not to rehire the seller's workers, and the closing occurred after the effective time of the sale, the buyer is responsible for giving notice.* This view is consistent with the statutory provision that the

> employees of the seller become the employees of the buyer immediately after the sale, with the intent of WARN that notice be given to workers who will suffer dislocations and with the reality of allocating responsibility for notice to the party to the transaction that actually makes the decision to order the plant closing or mass layoff. Other commentators agreed with the allocation of notice responsibility just discussed; one suggested that the apportionment of liability turn solely on when the plant closing or mass layoff occurs relative to the effective date of the sale.
>
> Some commentators suggested that the regulations be clarified to assign responsibility to the seller *through the date of sale and to the buyer on the next day. Such an interpretation is a possible reading of the statutory language; but DOL has rejected that reading because it would make either the seller responsible for the acts of the buyer or it would create a period in which no one is responsible for giving notice. The former alternative is inconsistent with the legal position of the parties after the sale has become effective. The latter alternative is inconsistent with the intent of the statute.* (Emphasis supplied).

20 C.F.R. § 639.3(c).

According to the lower courts' interpretation, MJ Optical could, by its actions, terminate the Commercial Optical employees, with impunity, on May 7, 1993 and assign the responsibility for giving the notice to Commercial Optical, who had no control over the buyer's actions since the transaction had already closed.

C. The Legislative History shows that Congress Intended the Buyer to Be Responsible for Notice After the Plant Closing.

The authors of WARN were concerned that someone should always be responsible for providing notice to employees. The language of the Act, however, creates a period during which no one is responsible and the regulations sought to fill this gap by interpreting "date" to mean "time".

The legislative history is also in accord with the interpretation by the Department of Labor. On June 28, 1988, the following exchange occurred on the floor of the Senate with respect to a modification of the provision regarding the sale of the business (see Cong. Rec. 58679-8680; June 28, 1988).

> **MR. HATCH: Madam President, we do not need to take much time because this amendment has been agreed to by the majority floor managers. I had pointed out several problems with the provision in the portion of the bill which attempts to deal with the sale and purchase of a business. One was there was no clear definition of liability and two there is ambiguity regarding the purchaser's obligations for any individual's continued employment under the purchase agreement. This amendment clarifies the issue on both of these points.**
>
> **I am pleased that the majority agrees with me and I ask for the YEAS and NAYS on this amendment.**
>
> **THE PRESIDING OFFICER: Is there a sufficient second? There is a sufficient second.**

The YEAS and NAYS were ordered.

THE PRESIDING OFFICER: The Senator from Massachusetts.

MR. KENNEDY: On behalf of the Senator from Ohio, Senator Metzenbaum and myself, I would urge the membership to support this particular modification and this particular amendment. The central thrust of both the managers, Senator Metzenbaum and myself, is to provide protection for the employees during the period of sale, and the clarification of this language insures both the protection for the employees and appropriate responsibility between the seller and the purchaser in complying with the thrust of this legislation.

I think it has now been clarified and I would hope that all of those that are supporting our legislation will support this modification. I think it is a useful one.

MR. HATCH: Thank you.

MR. METZENBAUM: Madam President, this amendment clarifies our intent that employees receive notice if there is a plant closing or mass layoff incident to the sale of part or all of the business.

Under this amendment, employees will be protected throughout the process of sale.

And the responsibility for giving notice, the legal duty to give notice, will be apportioned fairly and logically between the seller and the purchaser.

> *Until the sale is completed, the seller has the duty to give notice. Immediately upon completion of the sale, the duty to give notice is the purchaser's.*
>
> **Employers and affected employees will always know clearly which employer must give notice if a plant closing or mass layoff is ordered.**
>
> **And, most importantly, at not time will affected employees be unprotected against sudden mass layoffs or plant closings undertaken without fair notice. (Emphasis supplied).**

The legislative history whereby WARN was amended in Section 2101(b) indicates that the Senate was concerned about the apportionment of liability for a mass layoff or plant closing incident to a sale. Senator Metzenbaum specifically stated that the seller has the duty to give notice until the sale is complete. Once the sale is complete, the duty to give notice is the purchaser's. That is exactly the statutory intent that was implemented by the Department of Labor's regulations.

The implementing regulations use "time" and "date" interchangeably to indicate that there is a particular point in time at which the buyer becomes the employer for the employees. In fact, it is consistent with the statutory regulations which discuss this point. Thus, the regulations state that

> (1) If the seller is made aware of any definite plans on the part of the buyer to carry out a plant closing or mass layoff within 60 days of purchase, the seller may give notice to affected employees as an agent of the buyer, if so empowered. If the seller does not give notice,

> the buyer is, nevertheless, responsible to give notice. If the seller gives notice as the buyer's agent, responsibility for notice still remains with the buyer.

In fact, the Act provides:

> Notwithstanding any other provision of this Chapter, "any person who is an employee of the seller, other than a part-time employee, as of the effective date of the sale shall be considered an employee of the purchaser immediately after the effective date of the sale."

That phrase indicates that any Commercial Optical employee, as of May 7, 1993 (the effective date of the sale) is considered an employee of the purchaser immediately after the effective date of the sale. Again, the Act presumes that in a case such as that before the Court here, the employees become those of MJ Optical and their termination after the effective time of the sale must be the responsibility of the buyer. *See*: *Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272 (10th Cir. 1994) (" . . . the obligation to warn employees in the event of a closure or mass layoff skips from seller to buyer. Any argument to the contrary is simply foreclosed by the statute itself"). *Id.* at 1280.

D. The Federal Courts Are to Defer to The Administrative Regulations.

Generally, the federal courts are to defer to the administrative regulations promulgated by the agency charged with administering the statute. *Stinson v. United States*, 508 U.S. 36, 45 (1993); *Udall v. Tallman*, 380 U.S. 1 (1965). This is especially true where the statutory language does not speak directly to the issue before the

Court, and the courts should uphold the interpretation of the statute rendered by the administrative agency entrusted with interpreting it. As explained by this Court in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984),

> if . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative regulation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based upon a reasonable construction of the statute. *Id.* at 842-843.
>
> If an agency's construction is reasonable, a court must defer to it even though it may not be the only interpretation or the most reasonable one. All that is required to sustain an agency's interpretation is that it is "sufficiently rational [so as] to preclude a court from substituting its judgment for that of the agency." *See also*: *Chemical Manufacturer's Ass'n v. Natural Resources Defense Council*, 470 U.S. 116, 125 (1985).

The Secretary of Labor was granted authority under 29 U.S.C. § 2107 to prescribe regulations to carry out the WARN statute. The Supreme Court has held, in similar cases, that administrative regulations promulgated by the Department of Labor are generally valid and binding as a reasonable exercise of delegated authority. *See*: *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490 (1945). *See also*: *Hearnsberger v. Gillespie*, 435 F.2d 926 (8th Cir. 1970) (wherein the Eighth Circuit held that "It is well established that the interpretative regulations issued by the

Secretary of Labor are generally valid and binding, as a reasonable exercise of delegated authority.") Moreover, administrative regulations have the force of law as long as they are consistent with the purposes of the legislation.

Obviously, these regulations are valid and binding and are consistent with the congressional purpose. As seen above, the reason for defining "date" to mean "time" was to assure, at all times, that either the seller or the buyer was responsible for giving notice to the employees. Senator Metzenbaum's interpretation of the amendment as stated in the Congressional Record was that until the sale was completed, the seller has the duty to give notice. Immediately upon completion of the sale, the duty to give notice is the purchaser's. In this, the appeals court's interpretation of the relevant provision has already been specifically rejected by the Department of Labor in its administrative regulations and supplementary regulations.

If the lower court's decision is allowed to stand, it will have profound adverse implications for the rights of employees to receive advance notice of the loss of their jobs. Left standing, the precedent will provide a refuge for unscrupulous business owners. The purchaser may now terminate all of the seller's employees and claim that it was the seller's responsibility even though the transaction had already closed and the seller is powerless to prevent it. As long as the actions take place on the date of the transaction prior to 12:01 midnight of the next day, the purchaser is not responsible for failing to give notice to the employees. The decision will also allow the buyer in such a situation to merely plead "unforeseeable business circumstances" and provide a notice at that point to

employees telling them why it could not have provided them with sixty (60) days notice as required in the Act. The buyer and seller are both allowed to walk away while the employees are left to fend for themselves. The individuals to be protected by WARN, are left with no recourse for the loss of their jobs.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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et al., Petitioners

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-1097NE

Linda K. Burnsides, suing on behalf of herself individually and on behalf of a class of similarly-situated persons; Mary M. Sorg, suing on behalf of herself individually and on behalf of a class of similarly-situated persons; Gary Vyborney, suing on behalf of himself individually and on behalf of a class of similarly-situated persons, Appellants, v. MJ Optical, Inc., Nebraska Corporation; Optical Illusion, Inc., Nebraska Corporation; Commercial Optical Company, Inc., Nebraska Corporation; Optical Services, Inc., Nebraska Corporation; C.O.C., Inc., Nebraska Corporation; Optical Services, Limited Partnership; Sheldon I. Rips, an Individual, Appellees.	*	Appeal from the United States District Court for the District of Nebraska.

Submitted: September 8, 1997
Filed: November 10, 1997

Before FAGG, LAY and WOLLMAN, Circuit Judges.

FAGG, Circuit Judge.

After Commercial Optical Company, Inc. sold its equipment to MJ Optical, Inc., terminated its employees, and ceased operations, the former employees brought this action against MJ Optical, Commercial, Commercial's affiliated companies, and Sheldon I. Rips, Commercial's former president, director, and owner, asserting they failed to give the employees notice of employment loss in violation of the Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C. §§ 2101-2109 (1994). Following a trial, the district court granted judgment in favor of MJ Optical, Commercial, and the other defendants. The former employees appeal. We affirm in part, reverse in part, and remand for further proceedings.

Commercial operated an optical lens grinding and finishing facility in Omaha, Nebraska. After suffering significant financial losses in 1991 and 1992, Commercial sought financing and potential buyers in January and February 1993 without success. In March 1993, Rips began discussing a business consolidation with MJ Optical, another Omaha optical business. The parties signed a letter of intent on March 24, tentatively agreeing that MJ Optical would purchase most of Commercial's assets, including certain inventory, equipment, and customer accounts, and would take over operations at Commercial's plant for up to forty-five days, with the plant's later

use left open for further negotiation. Rips believed MJ Optical would continue to employ Commercial's employees. Potential consideration for the transaction exceeded $1 million. Negotiations continued until Sunday, May 2, when Rips and Commercial's attorney met with MJ Optical's president, Michael Hagge, and his attorney at Commercial's plant. When Rips demanded a certain price, Michael Hagge indicated he was no longer interested and left. During the meeting, Martin Hagge, Hagge's son and second-in-command at MJ Optical, had inspected Commercial's facility. After the meeting, he told his father the plant could not be operated profitably. Rips and Commercial's attorney discussed the company's dire financial situation, and decided to contact MJ Optical that evening and try to strike some kind of deal. Michael Hagge offered to buy Commercial's equipment and remaining inventory.

On Monday, May 3, Michael Hagge sent Martin Hagge to observe Commercial's plant in operation. Rips announced to employees that Commercial was selling substantially all of its assets to MJ Optical, but the employees would continue to work in Commercial's facility for MJ Optical. Rips introduced Martin Hagge as the new production manager, and Martin Hagge confirmed to employees who inquired that MJ Optical would have to have employees. Later that day, however, Michael Hagge decided MJ Optical would not take over operations at Commercial's plant, and informed his attorney to draw up papers to that effect. Between May 3 and May 5, attorneys for MJ Optical and Commercial drafted and revised an asset purchase agreement. On May 5, Rips signed the agreement in which MJ Optical offered to buy

Commercial's equipment, tools, and supplies for $100,000, inventory for cost, and intangibles for $100. The agreement specifically excluded accounts receivable from the sale and provided MJ Optical would not assume Commercial's liabilities. The agreement set the closing on May 7, and provided that from closing up to 45 days later, MJ Optical would be allowed access to Commercial's building to remove the purchased assets, but prohibited from manufacturing there. Rather than transferring employees from Commercial to MJ Optical, the parties agreed that Commercial would encourage its employees to apply for employment with MJ Optical.

At about 3:00 p.m. on May 7, Commercial informed its employees about the sale of assets and closing of the facility that day. Commercial's attorney, comptroller, and human resource manager all addressed the employees. Michael Hagge told Commercial's employees that MJ Optical wanted to hire as many people as possible, and the employees should apply. Later that afternoon, MJ Optical began removing equipment from Commercial's building. Some former Commercial employees later applied with MJ Optical. MJ Optical hired some of the applicants and rejected others.

WARN generally requires that before any plant closing, an employer must give sixty days' notice in writing to each affected employee. *See* 29 U.S.C. § 2102 (1994). A "plant closing" is a shutdown of a single site of employment that causes an "employment loss" for fifty or more employees during a thirty-day period. *See id.* § 2101(a)(2). An "employment loss" includes employment termination,

that is, the permanent cessation of the employment relationship. *See id.* § 2101(a)(6). In exclusions from the definition of employment loss, WARN provides:

> In the case of a sale of part or all of an employer's business, the seller shall be responsible for providing notice for any plant closing . . . in accordance with section 2102 of this title, up to and including the effective date of the sale. After the effective date of the sale of part or all of an employer's business, the purchaser shall be responsible for providing notice for any plant closing. . . .

Id. § 2101(b). The subsection "allocates notice responsibility to the party who actually makes the decision that creates an 'employment loss,' but 'creates no other employment rights.' " *International Alliance of Theatrical & Stage Employees v. Compact Video Servs., Inc.*, 50 F.3d 1464, 1468 (9th Cir.) (quoting 20 C.F.R. § 639.6), *cert. denied*, 116 S. Ct. 514 (1995).

The employees argue MJ Optical was responsible for giving them notice under § 2101(b). We doubt that § 2101(b) applies to the mere sale of assets in this case. Congress enacted the subsection to clarify that when employees are transferred from seller to buyer as part of a sale, employees have not suffered an employment loss. *See Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1280-81 (10th Cir. 1994) (White, J.). Courts have held that § 2101(b) does not apply to asset sales when there is no transfer of any employees into the purchaser's employment along with the purchased assets. *See Oil, Chem. & Atomic Workers Int'l Union v. CIT Group/Capital Equip. Fin., Inc.*, 898 F. Supp. 451, 457 (S.D. Tex. 1995). We need not

resolve the issue here, however. Even if this case involves the "sale of part or all of an employer's business" within the meaning of § 2101(b), responsibility for giving notice never passed to MJ Optical because the plant closing occurred on the sale's effective date. Through the end of that day, the employees were still employed by Commercial. *See Hotel Employees Restaurant Employees Int'l Union Local 54 v. Elsinore Shore Assocs.*, 724 F. Supp. 333, 335 (D.N.J. 1989) ("whoever is the employer at the time of the plant closing is responsible" for giving notice). Commercial brought about the employment loss by deciding to accept MJ Optical's offer to purchase the manufacturing equipment without transferring employees. Commercial terminated the employees, and MJ Optical had no reason to give the employees notice. MJ Optical did not automatically hire Commercial's employees, buy Commercial's facility, conduct any operations there, or take on any of Commercial's receivables or liabilities. Relying on 29 C.F.R. § 639.4(c), which states responsibility for giving notice remains with the seller "up to and including the effective date (time) of the sale," the employees argue the sale became effective at closing on the morning of May 7, and responsibility for giving notice transferred to MJ Optical then, before Commercial fired the employees or closed the plant. We reject the employees' interpretation of § 2101(b) because it is contrary to the plain terms of the statute. Under § 2101(b), the seller is the party responsible for giving notice during the effective date of the sale, and the asset purchase agreement declared it was "effective [the] 7th day of May." In sum, we conclude Commercial, not MJ Optical, was responsible for giving the employees notice.

The district court concluded two of WARN's affirmative defenses excused Commercial from the sixty-day notice requirement. Under 29 U.S.C. § 2102(b), the sixty-day notification period may be shortened if the employer shows the existence of certain circumstances. First, an employer need not give sixty days' notice if, at the time notice would normally be required, the employer was actively seeking capital or business to avoid or postpone the plant closing and the employer reasonably believed the giving of notice would have prevented the employer from obtaining the needed capital or business. *See id.* § 2102(b)(1). Second, an employer may order a plant closing before the sixty-day notice period concludes if the closing "is caused by business circumstances that were not reasonably foreseeable [when the sixty-day] notice would have been required." *Id.* § 2101(b)(2)(A). In either situation, the employer "shall give as much notice as is practicable and . . . a brief statement of the basis for reducing the notification period." *Id.* § 2102(b)(3); *see Local Union 7107 v. Clinchfield Coal Co.*, No. 96-1731, 1997 WL 562195, at *1 (4th Cir. Sept. 11, 1997).

The employees argue the defenses in § 2102(b) do not apply to the facts of this case. We agree that the actively seeking capital or business defense in § 2102(b)(1) is inapplicable. The district court found Commercial was seeking financing between March 7 and May 7, and any notice of a plant closing before May 7 would have doomed Commercial's efforts. But the undisputed evidence, including Rips's own testimony, shows Commercial was not seeking capital or business after February 1993. The district court also concluded MJ Optical's May 5 decision not to continue Commercial's operations as the

parties had previously planned was an unforeseeable business circumstance under § 2102(b)(2). An unforeseeable business circumstance is "a sudden, dramatic, and unexpected event outside the employer's control." *Loehrer v. McDonnell-Douglas Corp.*, 98 F.3d 1056, 1061 (8th Cir. 1996); *see* 20 C.F.R. § 639.9(b)(1). The test for reasonable foreseeability focuses on an employer's commercially reasonable business judgment. *See Loehrer*, 98 F.3d at 1060, 1061; 20 C.F.R. §§ 639.9(b)(1)-(2); *Teamsters Nat'l Freight Indus. Negotiating Comm. v. Churchill Truck Lines, Inc.*, 935 F. Supp. 1021, 1026 (W.D.Mo. 1996), *aff'd*, 121 F.3d 447 (8th Cir. 1997) (per curiam). Commercial did not have to show it was not economically feasible to wait sixty days before closing the plant. *See Loehrer*, 98 F.3d at 1061-62 n.7.

We conclude the closing of Commercial's facility was caused by business circumstances that were not reasonably foreseeable on March 7, 1993. At that time, Commercial was negotiating a sale of its business that included a transfer of employees to MJ Optical. Had the sale occurred as contemplated, it would not have caused a plant closing triggering WARN's notice requirement. Commercial exercised commercially reasonable business judgment in believing the sale would go through according to the March letter of intent. As it turned out, Michael Hagge decided at the last minute not to continue Commercial's operation and instead offered to purchase only certain assets. After MJ Optical's eleventh-hour change of heart, Commercial reasonably decided to cut its losses by selling its equipment to MJ Optical and closing the plant.

The employees argue the unforeseeable business circumstances defense should not apply when parties

negotiate a sale including a transfer of employees for months and then change their minds at the last minute. The employees argue that application of the defense in these circumstances encourages collusion between a seller and buyer to avoid WARN liability. There is no evidence of collusion to avoid WARN in this case. Indeed, the employees' baseless collusion theory ignores the obvious: Commercial had a strong motive to bargain for transfer of its employees to avoid triggering WARN's notice requirement. Despite this incentive, Commercial found itself compelled to accept terms dictated by the only interested buyer willing to offer some payment for assets of the unprofitable business. Also, the March 24 letter of intent makes clear the parties had only tentatively agreed to consummate a sale with a definitive agreement yet to be negotiated.

Nevertheless, when Commercial agreed on May 5 to sell its equipment to MJ Optical without transferring the employees, Commercial had an obligation to notify the employees that they would lose their jobs in two days. *See Teamsters Nat'l Freight*, 935 F. Supp. at 1026 (unforeseeable business circumstances defense still requires employer to give as much notice of closing as practicable once causal event becomes known). Commercial should have notified the employees then and explained why sixty days' notice was not given. Although the district court found Rips knew or should have known when he signed the asset purchase agreement on May 5 that Commercial's employees would not be transferred, the district court did not hold Commercial responsible for failing to give notice on that date because of the court's incorrect

view that notice before May 7 would have doomed Commercial's efforts to obtain financing. The district court also did not address the employees' assertion that Commercial cannot avoid liability for failing to give sixty days' notice because Commercial failed to give the notice or brief statement required by § 2102. Having rejected Commercial's financing defense, we remand for the district court to consider the employees' assertion and to calculate damages for Commercial's WARN violation. *See* 29 U.S.C. § 2104(a)(1) (employees are entitled to back pay and benefits for each day that an employer violates § 2102).

We affirm the district court's decision that Commercial rather than MJ Optical was responsible for giving notice under WARN, reverse the district court's decision that Commercial did not violate WARN, and remand for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-1097NE

Linda K. Burnsides, suing on behalf of herself individually and on behalf of a class of similarly-situated persons; Mary M. Sorg, suing on behalf of herself individually and on behalf of a class of similarly-situated persons; Gary Vyborney, suing on behalf of himself individually and on behalf of a class of similarly-situated persons, Appellants, v. MJ Optical, Inc., Nebraska Corporation; Optical Illusion, Inc., Nebraska Corporation; Commercial Optical Company, Inc., Nebraska Corporation; Optical Services, Inc., Nebraska Corporation; C.O.C., Inc., Nebraska Corporation; Optical Services, Limited Partnership; Sheldon I. Rips, an Individual, Appellees.	*	Appeal from the United States District Court for the District of Nebraska. [PUBLISHED]

ORDER

Filed: December 8, 1997

Before FAGG, LAY, and WOLLMAN, Circuit Judges.

The appellants' petition for rehearing is denied.

LAY, Circuit Judge.

I would grant Burnsides' petition for rehearing. I believe as a panel we were wrong in dismissing Burnsides' claim against MJ Optical. The facts show Commercial and MJ Optical intended the sales acquisition to close at 10:00 a.m. on May 7, 1994.* Commercial's counsel received the check and executed the closing documents at approximately 8:30 a.m. on May 7, 1994. Under the majority interpretation, the effective date of the sale was May 7, 1994, which means the sales transaction would not be deemed complete until 12:01 a.m. on May 8, 1994. Yet between 10:00 a.m. on May 7th and 12:01 a.m. on May 8th, Commercial announced the termination of the employees and MJ Optical removed the equipment from the facility. This means there was a fourteen-hour period during which neither Commercial nor MJ Optical bore responsibility for giving notice to the employees.

The WARN statute states the obligation to provide notice of termination to a seller's employees passes to the buyer after the effective "date" of the sale. 29 U.S.C. § 2101(b). In order to avoid this hiatus, where neither

* (Ex. 2) (A.0102).

party has the responsibility to give notice, "date" has been interpreted by the Secretary of Labor and the Department of Labor to mean "time." 20 C.F.R. § 639.4(c); 54 F.R. 16042, 16052.** Such an interpretation is not contrary to the statute. In fact, the Senate debate regarding Section 2101(b) demonstrates that "date" meant the time of the execution of the sale. Cong. Rec. 58679-8680. Under well-settled case law, an agency's interpretation of a statutory scheme should be given great deference. *Stinson v. United States*, 508 U.S. 36, 45 (1993); *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). Under the circumstances, I believe MJ Optical owed a duty to give sixty-days notice to all employees *at the time* when all documents were executed or no later than 10:00 a.m. on May 7, 1994.

A true copy.

Attest: /s/ Michael E. Gans
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

** The interpretive rule of the Department of Labor makes this clear:

> Some commentators suggested that the regulations be clarified to assign responsibility to the seller through the date of sale and to the buyer on the next day. Such an interpretation is a possible reading of the statutory language; but DOL has rejected that reading because it would either make the seller responsible for the acts of the buyer or it would create a period in which no one is responsible for giving notice. The former alternative is inconsistent with the legal position of the parties after the sale has become effective. The latter alternative is inconsistent with the intent of the statute. 54 F.R. 16042, 16052.

[p. 1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

LINDA K. BURNSIDES, MARY M. SORG, and GARY VYBORNY, suing on behalf of themselves individually and on behalf of a class of similarly situated persons,	)	8:CV93-246
Plaintiffs,	)	
vs.	)	
MJ OPTICAL, INC., d/b/a MJ OPTICAL, et al,	)	
Defendants.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW
OF THE HONORABLE WILLIAM G. CAMBRIDGE
UNITED STATES DISTRICT JUDGE

[p. 2] THE COURT: The following are my findings of fact and conclusions of law in this case, and I reserve the right to amend or supplement them in the event of appeal.

1. This is an action for monetary damages brought under the Worker Adjustment Retraining and Notification Act (WARN), 29 U.S.C. Section 2101 et seq., and the Nebraska Wage Payment and Collection Act, Nebraska Revised Statute 48-1228 et seq. Subject matter jurisdiction is based upon 28 U.S.C. Sections 1331 and 1337, 29 U.S.C. Section 1132(3)(1), and pendant state jurisdiction under 28 U.S.C. Section 1367.

2. Commercial Optical, Inc. operated an optical laboratory business which manufactured, processed and distributed optical products, located at 1323 Jackson Street, Omaha, Nebraska.

3. MJ Optical, Inc. d/b/a MJ Optical and Optical Illusions, Inc. are Nebraska corporations currently operating a lens grinding and finishing business in Ralston, Nebraska.

4. On May 5, 1993, Commercial Optical, Inc. executed an asset purchase agreement (Agreement) with Optical Illusions, Inc. to sell certain assets to it.

5. Michael Hagge executed the Agreement on Thursday, May 6, 1993.

6. There was no automatic transfer of Commercial Optical, Inc. employees to MJ Optical's payroll.

7. Some former Commercial Optical employees applied and [p. 3] were hired by MJ Optical. They were: Nancy M. Binder, Kathy Andersen, Alma D. Bramlett, Juanita J. Byers, Jane M. Agers, Kathy M. Farmer, James F. Farmer, Dennis K. Fenderson, Linda Fenderson, Anita K. Goodrich, Yong C. Gruber, Jo A. Hanson, Sandra K. Hendrick, Patricia Kay Lee, Theresa M. Minshall, Sharon A. Zendejas, Michael A. Albertson, Catherine A. Baker, Ida A. Chew, Forest D. Greening, Roger G. Hennig, Alejandro Hernandez, Melba J. Leete, Josephine A. Morrison, Evelyn G. Neill, Lynn Quinze, Leslie D. Stienblock, Rita Ann Valadez.

8. Other Commercial employees applied and were not hired by MJ Optical. They were: Sheila Sadofsky, Theresa J. Hane, Rita A. Ramage, Ernestine Banister,

Donna Leigh Sick, Bill Alfred Sick, Mae Rose Lloyd, Pearl A. Wilson, Marilyn S. Casper, Elizabeth Ann Cooper, Irene Taylor, Pablo Montano Alonso, Patricia A. Green, Larry Goodwin, Barbara Holland, Sandra Sue Thomas, Jerry Payne, Roy D. Lanham, Claudia Brown, Lewis J. Levine, Michael F. May, Vicki Prater, Linda L. Hike, Tim Higginbotham, Carol Hall, Kathryn Dueling, Bryan Keith Greening, Tim Alan Hass, Men Thi Nguyen and Gary Vyborny.

9. Neither the Mayor of Omaha nor the State of Nebraska Dislocated Worker Unit have ever been provided with any WARN notice from MJ Optical or Optical Illusion.

10. Plaintiffs consist of a class of former employees of defendant Commercial Optical, Inc., who suffered an employment loss due to cessation of operations of the Commercial Optical, [p. 4] Inc. plant on or about May 7, 1993.

11. Commercial is a Nebraska corporation which up until May 7, 1993, operated a lens grinding and finishing facility in downtown Omaha at 1323 Jackson Street (Commercial plant).

12. Optical Services, Inc. and C.O.C., Inc. (C.O.C.) are Nebraska corporations. Optical Services, Inc. operates retail optical stores in various locations within and outside Nebraska.

13. Optical Services Limited Partnership is a Nebraska limited partnership.

14. Commercial Optical, Inc. is owned by Optical Services Limited Partnership. Optical Services Limited

Partnership had as partners C.O.C., Inc. as the limited partner and Sheldon I. Rips as the general partner. C.O.C., Inc. was owned by Norman J. Rips and Sheldon I. Rips. Optical Services, Inc., was also owned by Optical Services Limited Partnership.

15. Commercial Optical, Inc. manufactured products for Optical Services, Inc. Optical Services, Inc. was approximately 40 percent of the total volume of Commercial Optical, Inc. Another major client was Medi-Save which in 1993 had approximately 40 percent of Commercial Optical's business.

16. The supervisors at the Commercial Optical, Inc. facility at 1323 Jackson Street were paid by either C.O.C., Inc. or Optical Services Limited Partnership. They, however, [p. 5] performed work at the Commercial Optical, Inc. facility and supervised Commercial Optical, Inc. employees.

17. Employees of Optical Services Limited Partnership and C.O.C., Inc. scheduled the work and determined which employees would come to work and what, if any, overtime needed to be worked. They worked side by side with Commercial Optical, Inc. employees. Commercial Optical, Inc. and Optical Services, Inc. shared a switchboard and a receptionist. These supervisors had the power to hire and fire Commercial Optical, Inc. employees.

18. Employment policies were the same for employees of Optical Services, Inc. and Commercial Optical, Inc. and these companies shared some equipment.

They employed the same outside accountants and attorneys. Commercial Optical, Inc., Inc., [sic] C.O.C. Inc. and Optical Services, Inc. were part of a "control group" for tax purposes.

19. Commercial Optical, Inc. had been losing money and Sheldon Rips through Optical Services Limited Partnership contemplated a sale and/or a merger of the company.

20. Commercial Optical, Inc. became involved in conversations with MJ Optical regarding different possible business consolidations. These contacts began in approximately March of 1993 and a letter of understanding with respect to a proposed purchase of most of the assets of Commercial Optical, Inc. was executed on or about March 23, [p. 6] 1993.

21. Negotiations continued until May 2, 1993, when a meeting was held at the Commercial Optical, Inc. plant among Sheldon Rips and his attorney, Jerry Slusky, and Michael Hagge and his attorney, Paul Gardner. Martin Hagge (the son of Michael Hagge) and John Kula, employees of MJ Optical, were also present in the plant for the purposes of inspecting the equipment and plant facility. They did not participate in the business negotiations.

22. During this May 2 meeting, certain demands were made by Sheldon Rips which were unacceptable to MJ Optical. Mr. Hagge and Mr. Gardner terminated the negotiations and left the meeting. At that point, any potential business deal had fallen through.

23. Martin Hagge and John Kula had determined in their inspection that there was very little value to MJ Optical in the equipment of Commercial Optical, Inc. and that MJ Optical could not effectively operate the facility in a profitable manner. Martin Hagge informed Michael Hagge of his conclusions after the negotiation meeting had finished.

24. After the negotiation meeting on May 2 terminated, Jerry Slusky and Sheldon Rips discussed various alternatives which might have been available to Commercial Optical, Inc. at that time. Recognizing the dire financial circumstances which faced Commercial Optical, Inc., Sheldon Rips directed Jerry [p. 7] Slusky to attempt to put together some kind of transaction with MJ Optical.

25. Later in the day on May 2, 1993, Jerry Slusky contacted Paul Gardner and asked him if there was any possiblity of making some kind of deal. Paul Gardner discussed the matter with his client, and MJ Optical offered to purchaes Commercial Optical, Inc.'s equipment and remaining inventory.

26. Michael Hagge directed Martin Hagge to return to the Commercial Optical, Inc. Plant on Monday, May 3, to observe the operation of the plant with employees present. Martin Hagge went to the Commercial Optical, Inc. Plant on the morning of May 3, along with Dawn Jensen, to make this further inspection.

27. On May 3, 1993, Commercial Optical, Inc.'s president and director, Sheldon Rips, verbally announced to employees that he (on behalf of Commercial Optical, Inc.) had entered into an agreement with MJ Optical or Optical

Illusion, Inc. to merge their two businesses and sell substantially all of the assets of Commercial Optical, Inc.'s assets to MJ Optical.

28. Sheldon Rips told Commercial Optical, Inc. employees that their jobs would be secure and that they would continue to work in the Commercial Optical, Inc. facility. Martin Hagge told Commercial Optical, Inc. employees who inquired that MJ Optical would have to have employees. Martin Hagge [p. 8] was identified by Sheldon Rips as the new production and operations manager to Commercial Optical, Inc. employees.

29. On Monday, May 3, Michael Hagge made the final decision that MJ Optical could not and would not continue that operation of the Commercial Optical, Inc. plant. The transaction would involve only the purchase of some assets and inventory. Michael Hagge informed Paul Gardner of the decision and directed him to complete the documentation of that transaction.

30. The purchase agreement and related documents were drafted and revised between May 3, 1993 and May 5, 1993. According to the terms of the executed agreement, the transaction was to close and become effective on May 7, 1993. The letter of understanding which had outlined the original transaction and the asset purchase agreement which was later negotiated and executed, differed significantly. The letter of intent contemplated the continued use of the Commercial Optical, Inc. plant, a transfer of accounts and employees, and potential consideration in excess of $1 million. The executed agreement, on the other hand, specifically states that MJ Optical was prohibited from using the Commercial Optical, Inc. plant

for manufacturing, excludes accounts from the assets being transferred, and indicates no employees will be transferred.

31. Pursuant to the asset purchase agreement executed by [p. 9] Commercial Optical, Inc. and MJ Optical, MJ Optical agreed to purchase Commercial Optical, Inc.'s equipment, inventory and general intangibles. The agreed upon consideration for the assets was $100,000 for the equipment, $100 for general intangibles, and the inventory at cost. No other assets, including employment contracts, the building (plant), or accounts receivable, were purchased by MJ Optical from Commercial Optical, Inc. Sheldon Rips executed the purchase agreement on behalf of Commercial Optical, Inc. on May 5, 1993 and Michael Hagge executed it on behalf of MJ Optical on May 6, 1993. On the morning of May 7, 1993, Paul Gardner delivered the executed purchase agreement and a check in the amount of $100,000 consisting of part of the purchase price to Jerry Slusky. The check was received on behalf of Kutak Rock, Attorneys at Law, Omaha, Nebraska, as trustee, to be held in accordance with the terms of the asset purchase agreement. This money was disbursed to Commercial Optical, Inc. some days later.

32. Michael Hagge was wholly unaware of the WARN Act and did not know of any obligation on the part of MJ Optical to give notice of the purchase of assets by MJ Optical.

33. The employees of Commercial Optical, Inc. were formally notified at approximately 3:00 p.m. on May 7, 1993 that the plant would be closing. At that same time, they were told that they could apply for positions with

MJ Optical. [p. 10] Commercial Optical, Inc.'s attorney, Jerry Slusky, Commercial Optical, Inc.'s chief financial officer, Jack Lawless, and MJ Optical's president, Michael Hagge were present at the time the employees were informed that the plant would be closing. Jerry Slusky and/or Jack Lawless actually informed the employees that the plant would be closing. Michael Hagge then informed the employees that MJ Optical would begin accepting applications the following day and that MJ Optical intended to hire a substantial number of the employees.

34. Fifty-six Commercial Optical, Inc. employees applied for positions with MJ Optical; twenty-eight were hired. A number of others were offered positions but either turned down the offer or accepted the offer but failed to show up for their first day of work. Those who were not offered positions were rejected because of their past performance problems or because they did not possess the skills needed by MJ Optical. A number of Commercial Optical, Inc.'s former employees who did not apply were contacted by MJ Optical and offered positions but refused the offer.

35. For at least the two years immediately prior to the closing, Commercial Optical, Inc. had been losing significant amounts of money. During the fiscal year ending September 30, 1992, Commercial Optical, Inc. lost $310,308. From October 1, 1992 through the month of closing in May 1993, Commercial Optical, Inc. lost another approximate $423,000.

[p. 11] 36. The officers and directors of Commercial Optical, Inc. specifically including Sheldon Rips, the president, had been constantly attempting to obtain additional capital, business and/or financing during the two years prior to closing to keep Commercial Optical, Inc. in business. The efforts to obtain financing included the following during the first part of 1993:

(A) Several meetings were held with First National Bank of Omaha which was the lender for Commercial Optical, Inc. First National Bank of Omaha did not want to extend additional credit and in fact wanted to terminate its involvement, but Sheldon Rips was attempting to negotiate a restructuring or modification of the financing terms which would have allowed Commercial Optical, Inc. to continue its operations.

(B) Two asset based lenders were contacted for purposes of obtaining financing. These lenders decided not to participate in the financing, but Sheldon Rips was hopeful in the attempts to interest these potential financing sources.

(C) Sheldon Rips had approached at least two companies, Omega Optical Company and Dynoptics, in addition to MJ Optical, with the possibility of working in to a merger arrangement of some kind. These efforts were also unsuccessful but were pursued with some hope of success by Sheldon Rips.

(D) Commercial Optical, Inc. continued through the latter [p. 12] part of 1992 and the first part of 1993 to work with suppliers for extended credit terms. Suppliers had clearly become a significant source of financing through credit terms and the further extension of time for

payment would have provided additional financing to maintain the operations of Commercial Optical, Inc.

37. Commercial Optical, Inc. was doing everything that it considered to be available for purposes of obtaining financing to maintain and preserve the continuing operations of Commercial Optical, Inc. Commercial Optical, Inc. reasonably believed that it could obtain a combination of financing and revenues which would allow it to continue in operation.

38. Had notice of a plant closing been given to employees of Commercial Optical, Inc. at any time prior to May 7, 1993, the actual date of closing, all attempts to obtain financing through lenders and for extension of credit by supplies would have immediately terminated. The First National Bank of Omaha would have made immediate moves to protect the assets securing its outstanding financing and suppliers would have stopped shipping product to Commercial Optical, Inc. This would have caused the Commercial Optical, Inc. plant to be closed almost immediately. All of its efforts were aimed at alternatives to keep its operation going. Commercial Optical, Inc. reasonably and in good faith [p. 13] believed that any notification of a plant closing would have precluded it from obtaining the needed capital or business and would have resulted in the immediate closing of the plant. One of the major concerns for Commercial Optical, Inc. throughout this period of financing pressures was that employees, lenders and/or vendors would think that Commercial Optical, Inc. would be required to close because of its financial problems.

39. The business in which Commercial Optical, Inc. and MJ Optical had been involved was cyclical by season. Business in the winter months was normally slow, followed by substantial increases in revenue into the springtime months Management of Commercial Optical, Inc. reasonably expected its revenue would increase during the spring of 1993 as it historically had done, and were relying on the anticipated increase in sales to allow it to keep its business operations going. To the contrary, Commercial Optical, Inc. experienced flat sales figures in the months of February, March and April of 1993. The sales deficiencies averaged approximately $200,000 per month. This unforeseen loss of revenue was critical and disastrous to Commercial Optical, Inc. in its attempts to keep its operation going.

40. Sheldon Rips believed that MJ Optical intended to operate the facility and retain all of the employees for a period of time. Michael Hagge and MJ Optical said nothing to [p. 14] Sheldon Rips prior to entering into the final agreement to indicate that they did not intend to conduct operations at the facility.

41. The Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. Section 2101, et seq. applies to the Commercial Optical, Inc. plant closing.

42. A threshold requirement for WARN coverage is the employment of 100 or more employees, excluding part-time employees, or 100 or more employees who in the aggregate work at least 4,000 hours per week (excluding overtime hours). 29 U.S.C. Section 2101(a).

43. Part-time employees are those employed for an average of fewer than 20 hours per week or who have

been employed for fewer than six of the 12 months preceding the date on which notice is required. 29 U.S.C. Section 2101(a).

44. Except as hereafter noted, WARN requires a 60-day notice to employees before a plant is shut down. 29 U.S.C. Section 2102(a).

45. The Commercial Optical, Inc. plant was closed on May 7, 1993. Sixty days prior to that was March 7, 1993. Six months prior to that date was September 7, 1992. Thus, any Commercial Optical, Inc. employees hired after September 7, 1992, are considered part-time employees for purposes of the WARN Act. As a result, Commercial Optical, Inc. had fewer than 100 employees for WARN Act purposes when the plant [p. 15] closed.

46. However, the evidence indicates that Optical Services Limited Partnership and C.O.C., Inc. employed persons who supervised and directed the work of Commercial Optical, Inc. employees. While the business of Optical Services Limited Partnership and C.O.C., Inc. were not included in the transaction between Commercial Optical, Inc. and MJ Optical, it is clear that at least ten individuals on the payrolls of Optical Services Limited Partnership or C.O.C., Inc. actually worked at Commercial Optical, Inc. Sheldon Rips testified that supervisors' salaries were paid through C.O.C., Inc. and Optical Services Limited Partnership solely for reasons of confidentiality. As long as these individuals actually worked for Commercial Optical, Inc., regardless of which entity their paychecks came from, they should be included in the total number of Commercial Optical, Inc. employees. As a

result, Commercial Optical, Inc. has met the WARN Act requirement for number of employees.

47. However, Commercial Optical, Inc. incurred no liability under the WARN Act because the company was excepted from giving the required notice to its employees. The evidence indicates that until May 5, 1993, Sheldon Rips was under the impression that he was selling a going concern to MJ Optical, and that the employees were included in the deal and would continue to have jobs. However, once Sheldon Rips [p. 16] signed the asset purchase agreement on May 5, 1993, he was charged with the knowledge that MJ Optical had no intention of buying the business. According to the asset purchase agreement, MJ Optical wanted only the assets of Commercial Optical, Inc., including equipment, inventory and intangibles such as customer and price lists. MJ Optical specifically declined to accept any of the company's liabilities. Moreover, the parties agreed that Commercial Optical, Inc. would "use all reasonable efforts to persuade such of the employees of the seller as the buyer may designate to become employees of buyer". This language indicates that MJ Optical would not be hiring all of Commercial Optical, Inc.'s employees. After reading and signing this agreement, Sheldon Rips knew or should have known that MJ Optical was purchasing only certain assets and not the business as a whole.

48. As long as Sheldon Rips was under the impression that MJ Optical was purchasing and would continue to operate the business, there was no reason for him to give notice to the employees of Commercial Optical, Inc. Optical, Inc. [sic] Moreover, once Sheldon Rips became aware on May 5 that the deal had changed, he did not

have time to give the appropriate notice. The "unforeseeable business circumstances exception" of 29 U.S.C. Section 2102(5)(2)(A), [i.e. "An employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by [p. 17] business circumstances that were not reasonably foreseeable as of the time that notice would have been required"] protects Commercial Optical, Inc. in this instance.

49. In the alternative, the "actively seeking capital" exception under 29 U.S.C. 2102(b)(1) [i.e. "An employer may order the shutdown . . . before the conclusion of the 60-day period if as of the time that notice would have been required the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business"] would also protect Commercial Optical, Inc. The evidence indicates that Commercial Optical, Inc. had, for all practical purposes, exhausted its potential sources of financing by that time. However, several of the witnesses testified about the cyclical nature of the optical business and how Commercial Optical, Inc. was expecting the usual spring upturn in sales in the February, March and April time frame. If Commercial Optical, Inc. had given notice of an impending plant closing, customers would have been reluctant to purchase products from Commercial Optical, Inc. and the expected spring upturn would certainly have been quashed. As Commercial Optical, Inc. was still hoping for an influx of business in the spring, this exception

excuses the company [p. 18] from giving the 60-day notice. Commercial Optical, Inc., then, is not liable to the plaintiffs, or any of them, for having failed to give notice under the WARN Act of the plant closing.

50. Likewise, MJ Optical incurred no WARN Act liability to the plaintiffs because MJ Optical was never in a position in this transaction for the WARN Act requirements to attach to it. In that regard, the Court finds the reasoning of *Oil, Chemical and Atomic Workers International Union versus CIT Group/Capital Equipment Financing,* 898 F.Supp. 451 (S.D Tex. 1995) to be persuasive. Specifically, "[w]hen assets of a business are purchased, rather than an ongoing business or part of a business, Section 2101(b)(1) ['In the case of a sale of part or all of an employer's business, the seller shall be responsible for providing notice of any plant closing or mass layoff . . . up to and including the effective date of the sale. After the effective date of the sale of part or all of the employer's business, the purchaser shall be responsible for providing notice. . . . Notwithstanding any other provision of this chapter, any person who is an employee of the seller (other than a part-time employee) as of the effective date of the sale, shall be considered an employee of the purchaser immediately after the effective date of the sale'] appears to apply only if the seller's employees are also transferred into the employ of the purchaser along with the purchased assets. [p. 19] *CIT Group* 898 F.Supp. at 457. Thus, WARN Act liability applies only to sales of a company's total business and to sales of part of a company's business that entail transfer of at least some of the employees and not to asset sales where there is no transfer of any employees.

51. Moreover, under the provisions of 29 U.S.C. Section 2101(b)(1) regarding the delineation of notification responsibilities as between the seller and buyer, it appears that if notice had been required, MJ Optical would not have been responsible for giving such notice. The law puts the burden of providing notice on the seller "up to and including the effective date of the sale." The evidence indicates that May 7, 1993 was the effective date of the sale of the Commercial Optical, Inc. assets. As the plant closed and the employees were terminated on that date, MJ Optical's responsibility to provide notice never came into play, according to the statutory language.

52. MJ Optical bargained for and purchased only certain assets of Commercial Optical, Inc. Those assets did not include employees or employee contracts. As stated previously, this was not a transfer of a going concern. On May 7, 1993, MJ Optical owned equipment, inventory and intangibles which had belonged to Commercial Optical, Inc. The plant itself was still owned by Commercial Optical, Inc. The plant was not MJ Optical's to shut down and the employees [p. 20] were not MJ Optical's to terminate. Because the employees were not specifically transferred to MJ Optical, MJ Optical was not responsible for notifying them of the plant closing.

53. As for the plaintiffs' claim for vacation pay under the Nebraska Wage Payment and Collection Act, Nebraska Revised Statute 48-1228 to 1232, I find in favor of the plaintiffs. Commercial Optical, Inc. had a policy of paying cash to employees for unused vacation time when they separated from the company's employ. Under Section 48-1229 this constitutes a fringe benefit, which, as such, is part of the employees' compensation. No party

disputes that said compensation has not been paid to the employees of the Commercial Optical, Inc. plant. Therefore, I find that plaintiffs are entitled to recover their accrued vacation pay as set forth in Plaintiffs' Exhibit 31.

54. I further find that, under the attorney's fees provision of Nebraska Revised Statute Section 48-1231, plaintiffs' counsel is entitled to recover an amount equal to one-third of the sum of plaintiffs' accrued vacation pay for his fees. The Court in its discretion declines to order Commercial Optical, Inc. to pay an amount equal to the judgment into the common school fund. Nebraska Revised Statute Section 48-1232. Any additional recovery ordered under 48-1232 is in the nature of a penalty and thus is left to the Court's discretion. *Suess versus Lee Sapp Leasing,* [p. 21] *Inc.* 229 Neb. 755, 428 N.W.2d 899 (1988). The court finds that the imposition of a penalty is unwarranted in this case because Commercial Optical, Inc.'s reasons for failing to pay the accrued vacation pay to these plaintiffs was its dire financial situation which led to the plant's closing in the first place.

55. For all these reasons, judgment will be entered in favor of all of the defendants and against the plaintiffs on all WARN Act claims. Judgment will be entered in favor of plaintiffs and against defendants Commercial Optical, Inc.; C.O.C., Inc.,; and Optical Services Limited Partnership on the claims for accrued vacation pay under the Nebraska Wage Payment and Collection Act. Furthermore, judgment will be entered against defendants Commercial Optical, Inc., C.O.C., Inc. and Optical Services Limited Partnership and in favor of the plaintiffs' counsel, for an amount equal to one-third of the accrued vacation pay owed to the plaintiffs for attorney's fees.